No. 343

In the Supreme Court of the United States

OCTOBER TERM, 1957

AMERICAN MOTORS CORPORATION, A MARYLAND CORPORATION, FORMERLY KNOWN AS NASH-KELVINATOR CORPORATION, A MARYLAND CORPORATION, AND UNITED STATES OF AMERICA, INTERVENOR, APPELLANTS

v.

CITY OF KENOSHA, A MUNICIPAL CORPORATION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

These three actions, involving the same material facts and identical issues of law, were consolidated for purposes of trial and of appeal to the Supreme Court of Wisconsin.[1] The memorandum opinion of the Circuit Court of Kenosha County, Wisconsin (Appendix, *infra*, pp. 13–29), is not reported. The opinion of the

[1] Since the three cases appealed are from the same court and involve identical questions, a single jurisdictional statement is being filed pursuant to Rule 15 (3) of the Revised Rules of this Court.

Supreme Court of Wisconsin (Appendix, *infra*, pp. 30–39), reversing the judgments of the Circuit Court, is reported at 274 Wis. 315.

JURISDICTION

These actions were brought under Section 74.73, Wisconsin Statutes, 1953, in the Circuit Court of Kenosha County, Wisconsin, for the recovery of personal property taxes for the calendar years 1952, 1953, and 1954 assessed, levied, and collected under Section 70.01, *et seq.*, Wisconsin Statutes, 1951, 1953. It was alleged that the Wisconsin statutes, as here applied, were repugnant to the Constitution of the United States and hence invalid. The Supreme Court of the State of Wisconsin sustained the validity of the statutes and the taxes imposed thereunder, and reversed the judgments of the Circuit Court of Kenosha County on January 7, 1957. (Appendix, *infra*, pp. 50–51.)

On January 24 and 25, 1957, respectively, American Motors Corporation and the United States filed motions for rehearing in the Supreme Court of Wisconsin. On March 5, 1957, that court denied the motions without opinion. (Appendix, *infra*, p. 51.) On May 15, 1957, a notice of appeal was filed in each case by American Motors Corporation and by the United States. Within sixty days thereafter, *i. e.*, on July 10, 1957, a justice of the Supreme Court of Wisconsin, in conformity with Revised Rule 13 of this Court, extended the time for docketing to and including August 14, 1957 (Appendix, *infra*, pp. 51–52). Jurisdiction is conferred on this Court by 28 U. S. C., Sections 1257

(2) and 2101 (c). *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Standard Oil Co.* v. *Johnson*, 316 U. S. 481; *United States* v. *Allegheny County*, 322 U. S. 174, 192; *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110.

STATUTES INVOLVED

Wisconsin Statutes (1951):

SEC. 70.01. *General property taxes; upon whom levied.* Taxes shall be levied, under the provisions of this chapter, upon all general property in this state except such as is exempted therefrom. Real estate taxes shall be deemed to be levied when the tax roll on which they are extended has been delivered to the local treasurer with his warrant for collection. When so levied such taxes shall be a lien upon the property against which they are assessed, superior to all other liens, effective as of May 1 in the year when levied, except in the case of special assessments of benefits for local improvements where the lien of such assessments shall be in force from the time as provided in section 62.16 (7) (c), and except that such special assessments in cities of the first class shall be in force as provided by the charter or general laws applicable to such cities.

SEC. 70.18. *Personal property, to whom assessed.* (1) Personal property shall be assessed to the owner thereof, except that when it shall be in the charge or possession of some person other than the owner or person beneficially entitled thereto in the capacity of parent, guardian, husband, agent, lessee, occupant, mortgagee, pledgee, executor, administrator, trustee, assignee, re-

ceiver, or other representative capacity, it shall be assessed to the person so in charge or possession of the same. * * *.

* * * * *

SEC. 70.19. *Assessment; how made; liability and rights of representative.* (1) When personal property shall be assessed to some person in charge or possession thereof other than the owner or person beneficially entitled thereto as hereinbefore provided, the assessment thereof, shall be entered upon the assessment roll separately from the same person's assessment of his own personal property, adding to his name upon such roll words briefly indicating that such assessment is made to him as the person in charge or possession thereof as occupant or possessor of the premises on which such property is stored or piled or as the husband, agent, lessee, occupant, mortgagee, pledgee, executor, administrator, trustee, assignee, receiver or other representative of the owner or person beneficially entitled thereto; but a failure to enter such assessment separately or to indicate the representative capacity or other relationship of the person assessed shall not affect the validity of the assessment.

(2) The person so assessed shall be personally liable for the tax thereon. He shall have a personal right of action against the owner or person beneficially entitled to such property for the amount of such taxes and shall have a lien therefor upon such property with the rights and remedies for the preservation and enforcement of such lien provided in sections 289.45 and 289.48, and shall be entitled to retain possession of such property until the owner or person beneficially

entitled thereto shall have paid the tax thereon or shall have reimbursed the person assessed for such tax if paid by him. * * *.

Sections 70.01, 70.18 and 70.19, Wisconsin Statutes (1953), contain identical provisions.

QUESTIONS PRESENTED

1. Whether Sections 70.01, 70.18, and 70.19 of the Wisconsin Statutes, as here construed and applied by the Supreme Court of Wisconsin, are repugnant to the Constitution of the United States and therefore invalid, in that they impose a personal property tax upon property of the United States immune from state and local taxation.

2. Whether the rights acquired by the United States under a contract through which it is exercising its constitutional functions are to be determined by federal, rather than by state, law.

3. Whether the United States, under its contract with American Motors Corporation, had acquired a substantial interest in the personal property upon which the local taxes here involved were levied.

STATEMENT

The facts are stipulated and may be briefly summarized as follows:

On March 27, 1951, American Motors Corporation entered into a letter contract with the United States, through the United States Air Force, for the manufacture and supply of aircraft engines, replacement parts, overhaul tools, test and ground handling equipment therefor, and miscellaneous services and equipment. The contract was carried out at the plant

owned by American Motors in the City of Kenosha, Kenosha County, Wisconsin. (R. 104.)[2]

Pursuant to the contract, American Motors, from time to time, acquired aircraft engine inventory, consisting of raw materials, supplies, work in process and completed parts for the construction of aircraft engines, and proceeded to manufacture aircraft engines. American Motors separated and segregated from its automotive operations all property and inventory used in connection with the contract. None of that property was or could have been used by American Motors for purposes other than those of the contract. Materials, either in the form of raw stock or in the form of manufactured parts, which were rejected or scrapped or reworked, pursuant to the provisions of the contract, were separately handled and separately accounted for and were not commingled with other property used in the regular course of American Motor's regular business in the manufacture of automobiles. American Motors set up and maintained separate books for the operations under the contract. (R. 78–80.)

The contract terms in effect throughout the periods covered in these cases included the following (R. 56):

> 42. *Partial Payments.*—Partial payments, which are hereby defined as payments prior to acceptance on work in progress for the Govern-

[2] A certified transcript of the record is being filed in each of the three cases. Since the material facts and questions presented are identical, references, unless otherwise indicated, will be made to the record involving the taxable year 1952 and bearing the Supreme Court of Wisconsin docket number 103.

ment under this contract, may be made upon the following terms and conditions.

* * * * *

(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and nondurable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: * * *

On January 31, 1952, American Motors rendered its first bill to the United States, pursuant to the partial payment clause, in the net amount of $105,843.11, which was 75 per cent of the accumulated expense. On March 14, 1952, the United States made the first partial payment to American Motors in the sum billed, namely, $105,843.11. On April 1, 1952, a partial payment of $3,809,915.05 was made. Thereafter, and throughout the years involved in these cases, American Motors continued to render billings to the United States and continued to receive partial payments under the contract. (Ex. F, R. 45, 57.)

As of the close of the 1st day of May 1952, American Motors had in its possession aircraft engine inventory and aircraft engines upon which the assessor for the City of Kenosha established an assessed valuation of $57,520. Based upon such assessed valuation, the City

of Kenosha levied upon American Motors an *ad valorem* personal property tax for the calendar year 1952 in the sum of $3,106.08. Upon a similar basis, *ad valorem* personal property taxes were assessed and levied for the year 1953 in the sum of $212,598.90, and for the year 1954 in the sum of $121,742.27. Taxes for the three years, totaling $337,447.25, were paid by American Motors under protest and claims for refund filed and rejected.[1]

Thereafter, American Motors instituted these three actions in the Circuit Court of Kenosha County to recover the *ad valorem* personal property taxes so assessed and paid. In its pleadings filed in each case, American Motors alleged that title to and ownership of the personal property upon which the assesssments were based were vested absolutely in the United States. (R. 45–50.) It was further alleged that if the laws of Wisconsin, properly construed and applied, purport to authorize the assessment and taxation of such property, such laws are repugnant to the Constitution of the United States. (R. 50.)

The United States filed a petition to intervene in each case, adopting as its own the allegations made by American Motors. (R. 33.) By stipulation of the parties, the United States was admitted as intervening plaintiff in each case. It was further stipulated that the constitutional issue was presented in these cases. (R. 77.)

On motions for summary judgment, the Circuit

[1] See the respective complaints and answers. (R. 20, 28 in Supreme Court of Wisconsin docket number 103; R. 8, 25 in docket number 104; R. 11, 37 in docket number 105.)

Court of Kenosha County entered judgments for American Motors and the United States.

On appeal by the City of Kenosha, the constitutional issue set forth above was presented to the Supreme Court of Wisconsin. (Stip., par. Tenth, R. 77.) The majority of that court reversed the lower court's judgments, holding that the question of ownership of the property upon which the tax was levied was "one of local law". Disagreeing with the decision in *City of Detroit* v. *Murray Corp. of America*, 234 F. 2d 380 (C. A. 6th), it held that, though the United States had acquired title to the property, under local law it was not "the true owner". On this ground, the court sustained the validity of the Wisconsin statutes as applied. (Appendix, *infra*, pp. 30–39.) One justice dissented on the grounds that the issue of immunity from local taxation of property in which the United States claims an interest presents a question of federal and not state law; that the rights of control retained by the Government under the contract gave it far more than a bare legal title; and that there was a constitutional barrier to imposition of the taxes. (Appendix, *infra*, pp. 39–45.)

THE QUESTIONS ARE SUBSTANTIAL

1. These appeals present important constitutional questions involving the immunity of the United States from taxation of its property by the States. The decision of the Supreme Court of Wisconsin sustaining imposition of the local taxes is one of obvious and far-reaching implications. While the taxes were collected from the American Motors Corporation, the

United States, under the terms of its contract with the company, must bear the full burden. (Par. 10 (e) of the contract, Ex. I, R. 48, 61.) The type of contract is one which is widely used. This is pointedly illustrated by *City of Detroit* v. *Murray Corporation of America*, 234 F. 2d 380, certiorari granted, 352 U. S. 963 (No. 36, this Term), in which the Sixth Circuit construed a similar contract as placing the property there involved beyond the local authority's taxing power.[4] See, also, *United States* v. *Ansonia Brass and Copper Co.*, 218 U. S. 452.

2. The decision below departs sharply from principles which have been enunciated by this Court. It is also in direct conflict with the *City of Detroit* case, *supra*, in which this Court has already granted a writ of certiorari.

a. In *City of Detroit*, the Sixth Circuit affirmed a lower court ruling that title to property held by a contractor under a contract similar to that involved here was vested in the United States. It concluded, relying upon *United States* v. *Allegheny County*, 322 U. S. 174, and other decisions of this Court, that a local tax levied upon such property violated the sovereign immunity of the United States.

The *Allegheny County* case had involved an effort to tax, in the hands of a lessee, machinery to which the United States (also, under the terms of a government contract) held title. This Court declared (322 U. S. at 189) that the property, "to the full extent of

[4] In the *City of Detroit* case, this Court postponed a question as to its jurisdiction on appeal until the argument on the merits. 352 U. S. 960 (No. 18, this Term).

the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee."

b. The Supreme Court of Wisconsin has held that the question of "ownership", under the government contract, is one of local law; that the United States had only a naked legal title, with equitable title in the contractor; and that, in these circumstances, an *ad valorem* property tax might constitutionally be applied. (Appendix, *infra*, pp. 30–39.)

This approach, we submit, cannot be squared with this Court's explicit holding in the *Allegheny County case* (322 U. S. at 183) that:

> The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of *federal law not controlled by the law of any State.* [Emphasis added.]

c. The court below noted that the instant case involves a "partial payments clause of a contract practically identical" with the contract in the *City of Detroit* case. (Appendix, *infra*, p. 33.) But while the Supreme Court of Wisconsin concluded that the United States, under its contract, obtained only a naked legal title, the Sixth Circuit, construing the "practically identical" contract, concluded, at least implicitly, that the United States acquired a substantial proprietary interest. Thus, the Sixth Circuit carefully noted the City of Detroit's contention that the Murray Corporation, and not the United States, had

equitable title. 234 F. 2d at 381–382. It went on to declare (pp. 383–384) that the case of *S. R. A. Inc.* v. *Minnesota,* 327 U. S. 558, "is not apposite for the reason that in that case the contract involved transferred the equity in the land to the purchaser, leaving in the United States only a legal title as security, rendering it the equivalent of a mortgage."

We believe it apparent, therefore, that there is conflict not only as to the ultimate issue of sovereign immunity and as to the choice-of-law (state *v.* federal) issue, but also as to the proper construction of this familiar type of government contract.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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AUGUST 1957.

APPENDIX

1. Opinion of Circuit Court for Kenosha County, Wisconsin

The three above-entitled actions come on before the Court on a motion in each for a summary judgment. The cases have by order been consolidated for purposes of trial. The facts are stipulated in writing and according to the stipulation the issues of law have been submitted upon briefs without oral argument. In these actions the United States of America was permitted by order to intervene as plaintiff. For purposes of convenience the intervener, United States of America, will be referred to as "government".

On March 27, 1951, effective as of that date the government, Department of the Air Force, entered into a contract known as a Letter Contract with the plaintiff for the manufacture and supply of certain aircraft engines and for the manufacture and supply of repair and replacement parts therefor, overhaul tools, test and ground handling equipment therefor, and miscellaneous services and equipment in connection therewith. On the 21st day of March, 1952, this Letter Contract was amended in certain respects not material to this controversy. On the 29th day of August, 1952, and effective as of that date, the plaintiff and the government entered into what has been referred to as a "Definite Contract" as contemplated by the aforementioned Letter Contract and which Definite Contract superseded said Letter Contract. The Definite Contract made no material changes so far as this controversy is concerned. The place of the performance was the plant of the plain-

tiff in the City of Kenosha, County of Kenosha, State of Wisconsin. From time to time during the respective periods involved in these three cases the plaintiff acquired what is referred to as the aircraft engine inventory which consisted of raw materials, supplies, work-in-process and completed parts for the performance of said contract. The first payment on this contract was made by the government to the plaintiff on the 14th day of March, 1952, and further payments were made by the government thereafter from time to time. Neither the first nor any subsequent payment exceeded seventy-five (75%) percent of the cost to the contractor of the property upon which each such payment was made.

As of the close of the first day of May, 1952, the assessor of the defendant made what purported to be an assessment on the aircraft engine inventory in the sum of $57,520.00; and based upon said valuation said assessor levied a personal property tax against the plaintiff, on behalf of the defendant, in the sum of $3,106.08. This tax was paid by the plaintiff under protest.

As of the close of the first day of May, 1953, the assessor of the defendant made what purported to be an assessment on the aircraft engine inventory in the sum of $4,011,300.00; and based upon said valuation the said assessor levied a personal property tax against the plaintiff on behalf of the defendant in the sum of $212,598.90, which said sum the plaintiff paid under protest.

As of the close of the first day of May, 1954, the assessor of the defendant made what purported to be an assessment on the aircraft engine inventory in the sum of $3,927,170.00; and based upon said valuation said assessor levied a personal property tax against the plaintiff, on behalf of the defendant, in the sum

of $121,742.27, which said sum the plaintiff paid under protest.

No claim is made that the remedy here sought in each case is not available to the real party in interest or that any of the conditions precedent to the maintenance of such cause of action has not been fully complied with. The defendant contends that by reason of the supplemental agreement, Exhibit "K", annexed to and made a part of the second amended complaint in case No. 13641, and in like exhibits in the other cases, the plaintiff is not the real party in interest and that by reason of the undertaking on the part of the government to reimburse the plaintiff if it is held liable for the amount of the taxes involved in the three actions it is the real party in interest. The plaintiff in each of these cases is and was the taxpayer and as such is entitled to bring and maintain the respective actions notwithstanding the provisions of said exhibit "K", and by reason of the provisions thereof the government has such an interest in the within actions as to entitle it to intervene therein as a plaintiff. It may be noted that the stipulation provides in the event it is held that the assessments are invalid judgment shall go in favor of both the plaintiff and the government.

Sections 1.02 and 1.03, Statutes, provides for the exemption of government owned lands from state taxes. There is no provision of the Wisconsin Statutes with respect to taxes on personal property owned by the government. On page 3 of the defendant's brief it is stated that the defendant does not deny the proposition that property undisputedly owned by the United States is exempt from local taxation. However, it is contended by the defendant that even if it should be held herein that the ownership of the per-

sonal property upon which these respective assessments were made was in the government that the property is, nevertheless, subject to tax by reason of the fact that it was in the possession of the plaintiff as the agent or bailee of the government at the time the assessments were made and that under Wisconsin law personal property owned by the government in the possession of a representative of the government in this state is subject to tax assessed and levied against the representative. Section 70.19 (2), Statutes, provides that the person so assessed shall be personally liable for the tax thereon and that he shall have a personal right of action against the owner or person beneficially entitled to such property for the amount of such taxes and shall have a lien therefor upon such property with the rights and remedies for the preservation and enforcement of such lien provided in sections 289.45 and 289.48 and shall be entitled to retain possession of such property until the owner or person beneficially entitled thereto shall have paid the tax thereon or shall have reimbursed the person assessed for such tax if paid by him. Section 70.20 (1) provides that when any personal property shall be assessed to some person in charge or possession thereof, other than the owner, such owner as well as the person so in charge or possession shall be liable for the taxes levied pursuant to such assessment; and the liability of such owner may be enforced in a personal action as for a debt. The section also provides that such action may be brought in the name of the town, city of village in which such assessment was made if commenced before the time fixed by law for the return of delinquent taxes but if commenced later shall be brought in the name of the county, etc. Section 70.20 (2) provides that the remedy of attachment may be allowed in such action upon filing an affidavit of the officer by whose

direction such action shall be brought, showing the assessment of such property in the assessment district, the amount of tax levied pursuant thereto, that the defendant was the owner of such property at the time as of which the assessment thereof was made, and that such tax remains unpaid in whole or in part, and the amount remaining unpaid. It also provides that no property shall be exempt from attachment or execution issued upon a judgment against the defendant in such action.

It is obvious that these statutes contemplate a remedy in the form of an action for debt by the local tax assessors against the owner and a remedy by attachment against the personal property of the owner and that no property of the owner shall be exempt from attachment or execution upon a judgment in such an action. It is also obvious that these statutes contemplate that the person acting in a representative capacity in possession of the personal property against which a personal property tax is levied and assessed shall have a cause of action against the owner for the amount of the taxes paid on such personal property and shall have the right to hold said property with a lien thereon for the amount of the taxes paid. If American Motors had not paid the tax could the government have been sued in an action for debt or could its personal property such as involved in these cases have been attached, or could the provision that no property of the government, whether this or any other property, would be exempt from attachment or execution be upheld? It is not within the constitutional or legislative powers of any state to confer a cause of action in favor of anyone against the government. Accordingly it is not within the constitutional or legislative powers of the state of Wisconsin to confer a cause of action in favor of the plaintiff against the government in any of

these cases now before the court. It is not within the constitutional or legislative powers of the state of Wisconsin to confer a cause of action for debt in favor of any of its municipalities and against the government, and it is not within the constitutional or legislative powers of the state of Wisconsin to submect [sic] the property of the government, real or personal, to attachment or to declare that the property, real or personal, of the government is not exempt from attachment or execution. These conclusions are too elementary and so clear as to require the citation of no authorities in support thereof. If the personal property of the government could be attached or if the agent or bailee of the government in whose possession the personal property was at the time a personal property tax was assessed, levied and paid by such representative could hold such property and have a lien thereon the delay involved would hinder or prevent the timely and adequate preparation for defense and the winning of any war either prevented or seriously jeopardized.

The defendant relies on Sec. 70.18 (1), Statutes, which, insofar as applicable here, reads as follows:

> Personal property shall be assessed to the owner thereof, except that when it shall be in the charge or possession of some other person than the owner or person beneficially entitled thereto in the capacity of parent, guardian, husband, agent, lessee, occupant, mortgagee, pledgee, executor, administrator, trustee, assignee, receive [sic], or other representative capacity, it shall be assessed to the person so in charge or possession of the same.

With one exception all of the Wisconsin cases in which personal property was assessed to the person or corporation in possession thereof the personal property was privately owned. In the case of *Superior Ship Building Co.* v. *Beckley*, 175 Wis. 272,

it was held that practically all of the personal property involved in the assessment in that case was owned by the government and that the assessment was invalid. Although the government owned property was in the possession of Superior Ship Building Co. there is no mention of Sec. 70.18 in the decision of the Court. In that case the contract provided in effect that all personal property inspected, approved and paid for by the government should, so far as paid for, be in the government at all times and it was held that the government had expended and advanced moneys equal, if not more than, the value of the property taxed. It is contended by the defendant that if the question had been raised or considered that under 70.18 personal property shall be taxed to the person in possession a different conclusion would have been reached. This section of the statute must be construed in connection with the other sections hereinbefore cited relating to the taxation of personal property and the remedies afforded with respect thereto. If possible the section should be so construed as to uphold its validity. The intent and purpose of the legislature was to prevent the owner of personal property from evading taxation of his personal property in the taxation district in which it was located by transferring the possession thereof to another who was holding it in a representative capacity and this result was to be accomplished by assessing the property for personal property taxation against the person in possession and conferring upon such person a cause of action against the owner for the amount of the tax and the remedy of a lien on such personal property for the amount of the tax until paid by the owner. These sections are based on the assumption that the owner would be liable for the tax if the property was in the possession of such owner.

In one of the cases cited it is stated that the person in possession is personally liable for the tax. This statement also rests upon the assumption that the owner would have been liable for the tax if the property had been in the possession of such owner. No difficulty is encountered in sustaining the validity of the sections in question if these sections are construed to be applicable only in those situations where the property is in the possession of one acting in a representative capacity and the owner would have been liable for the tax if the property had been in the possession of such owner. The conclusion is therefore reached that if the title to the property which was the subject of the assessments in these cases was at the time of each respective assessment in the government then these sections of the Wisconsin Statutes are not applicable and the party in possession at the time the assessment is made is not personally liable for the assessment and such assessment is invalid.

The further contention is made by the defendant that under the holding in the case of *Kaiser Co.* v. *Reid*, 30 Cal. (2) 610, 184 Pac. (2) 879 (1947) that the possessory rights of the plaintiff in the personal property in question had a value which was subject to taxation against such plaintiff under Wisconsin Statutes. The California case involved possessory rights in real estate. Apparently this case never reached the Supreme Court of the United States. Unfortunately for the defendant there is no Wisconsin statute which provides for the assessment of the value of possessory rights separate and apart from an assessment on the valuation of all other interests in personal property and even if there were such a statutory provision the assessments in question were based upon the entire value of the personal property

and no attempt was made to separate or assess the value of the possessory rights of the plaintiff therein.

The provisions of the contract are clear and definite to the effect that as of the time of the first partial payment under the contract the title to all personal property then in possession of the plaintiff should vest in the United States and that all personal property thereafter acquired by the plaintiff in the performance of the contract should, as of the time the respective items thereof were acquired by the plaintiff and delivered to it, likewise be and become vested in the government. At the time the first of the three assessments was made a partial payment had been made by the government to the plaintiff on the contract and it is accordingly contended by the plaintiff and the government that the title to the personal property involved in the first assessment was vested in the government at the time said assessment was made. The same contention is made with respect to the second and third assessments. If the title of the personal property was so vested at the time the respective assessments were made then the court has no alternative but to hold that the assessments and each of them were invalid, for the reason that the government is immune from taxation by the state or any subdivision thereof on personal property the title to which was vested in it at the time the assessment was made.

It is contended by the defendant that the title to the personal property was not in the government at the time the respective assessments were made for the reason that the officers of the government who executed the contract on its behalf with the plaintiff were not authorized or empowered by congress to contract with the plaintiff for the vesting of title in the government as provided in said contract.

The defendant relies on the following Congressional Acts:

> Advances of public monesy [sic]; prohibition against. No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * * [31 U. S. C. A. Section 529.]
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> Advance payments on negotiated contracts; governing terms.
>
> (a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: Provided, that advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.
>
> (b) The terms governing advance payments may include as security provision therefor, and upon inclusion of such provision there shall thereby be created, a lien in favor of the government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree. [41 U. S. C. A. Section 154.]

(a) and (b) above set forth are applicable only to those situations where advance payments are made on negotiated contracts. The term "advance payments"

means payments exceeding the value of the services rendered or the articles delivered prior to such payment. It satisfactorily appears from the record in these cases that no advance payments were made at any time during the respective periods involved and that only partial payments not exceeding the percentage specified in the contract were made.

No claim is made that Congress did not authorize the making of a contract in some form for the aircraft engines, etc. involved in the contract in question. The case of *Kern-Limerick, Inc.* v. *Scurlok* [sic], 347 U. S. 110, 98 L. Ed. 549, involved a contract entered into by the Department of the Navy. At page 116 of the former and page 553 of the latter citation the Court said:

> Where there is no prohibition of a particular type of contract and no direction to use a particular type, the contractors are free to follow business practices.

In the footnote cases are cited in support of the Court's holding.

The aforesaid holding in that case is equally applicable to a contract made by the Department of the Air Force. The contract in question complied with the above quoted provisions of 31 U. S. C. A. Sec. 529 and all partial payments made under the contract conformed thereto. The legislation did not prescribe any particular type of contract other than that relied upon by the defendant as aforesaid nor did the legislation prescribe when title to the personal property acquired by the plaintiff for the performance of the contract should vest in the government. The court is therefore of the opinion that it was within the power and authority of the Department of the Air Force to embody in the contract in question the provisions with respect to when title

to the personal property should vest in the government.

It is contended that the title vested in the government was either colorable or in the nature of a lien operating as security for the government. There is nothing in the contract to indicate that the plaintiff was at any time to reacquire title to any of the property subsequent to the time title thereto became vested in the government. It was not in the interest of the government to acquire a lien or security in that sense. If it was intended that the government should acquire only a lien then before the government could take possession of said personal property it would be necessary for it to foreclose the lien. If the plaintiff had defaulted in the performance of its contract and the rights of the government in and to the personal property was limited to a lien right there would be delay in the foreclosure of the lien and the government would be unable to immediately take possession of the personal property and deliver it to some other contractor who would perform the contract and provide the government with the implements and materials of war or defense with the necessary dispatch. It was, therefore, good business for the government to acquire absolute title at the earliest possible moment.

Section 121.18, Wisconsin Statutes, reads as follows:

> (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

Section 121.17, Wisconsin Statutes reads as follows:

> Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 121.06.

The court sees no escape from the conclusion that the parties to this contract intended that absolute title should be transferred and become vested in the government as to all personal property in the possession of the plaintiff at the time the first payment under the contract was made and as to the then unascertained goods that the absolute title to such goods should pass immediately upon the same becoming ascertained, that is, at the time of the acquiring and the delivery of the same to the plaintiff. The court is, therefore, of the opinion and so holds that the title to the personal property at the time the respective assessments were made was vested absolutely in the government.

It is contended by the defendant that the supplemental agreement on the part of the government to reimburse the plaintiff for the respective amounts expended by it for the personal property taxes here involved in the event the taxes are held valid affords to the plaintiff the remedies against the government contemplated by Section 70.19, Wisconsin Statutes. This could only be true upon the theory of waiver of immunity by the government to the taxation of the personal property in question or consent by the government to the conferring of a cause of action against the government in favor of the plaintiff for the reimbursement of the plaintiff by the government for the payment by said plaintiff of a valid personal property tax. The conferring of such cause of action or the

waiver of immunity to taxation could only be conferred as to the cause of action or waived as to immunity to taxation by Congress. There has been no such congressional action. Under the powers and authority conferred by Congress to the Department of the Air Force there was no delegation of authority to the officers of the department to confer any cause of action in favor of the plaintiff which would impose liability on the part of the government for the reimbursement to the plaintiff for the payment by the latter of any tax, the liability for which the government was immune, or to waive the government's immunity from liability for the taxes in question. In the case of *United States* v. *County of Allegheny*, 322 U. S. 174–198, 88 L. Ed. 1209, the Court said:

> We find no support for the claim that the immunity has been waived. Congress certainly has not done so. It is true that the contract requires Mesta to obey and abide by the "applicable" law of Pennsylvania. But such language does not require Mesta to submit to unconstitutional exactions. It clearly is inadequate to waive Federal immunity, even if we assume a contracting officer had power to do so. Likewise any contractual obligation of the War Department to pay Mesta's taxes does not operate either to waive or to create an immunity. Nor is the validity of the tax dependent upon the ultimate resting place of the economic burden of the tax. We also think it immaterial what, if any, right of reimbursement the Pennsylvania law grants a lessee against a private lessor in similar circumstances. State law could not obligate the Central Government to reimburse for a valid tax, much less for an invalid one.

The defendant further claims that if it loses the benefit of the tax revenue here involved an unjust burden would be cast upon the other taxpayers of

the city and also the provisions in the contract for the vesting of title in the United States should not be upheld for the reason it would create an unequal burden between municipalities in which similar contracts were made. With respect to the first of these two claims the defendant is not entitled to satisfy its financial requirements by exacting an illegal tax and the citizens within the boundaries of the defendant are not entitled to have their tax burdens eased or lessened by the assessment and levy of an illegal tax against any taxpayer. With respect to the second of said claims as to inequality of burden as between municipalities it seems to the court that no other municipality in any state would be in any better or worse position from either a constitutional or legal standpoint as to its ability to tax personal property of the government. If it is good business practice for the department to insert the provisions with respect to the vesting of title to personal property in the government in the contract here involved it would be equally good practice for such provisions to be inserted and included in every other similar contract wherever it was to be performed. It cannot be assumed that the department or its officers authorized to execute such contracts would follow a good business practice in one locality and not follow it in all other localities. In the *Allegheny* case the Court had this to say:

> The equities in this unfortunate conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization. Whether a county loses more than it gains by such Federal activity, and what other Federal benefits ought to be considered if a balance were to be struck between advantages and disadvantages, we cannot say. The adjustment of benefits

> and burdens is for other departments, and studies to that end have been undertaken. We can only say that our constitutional system as judicially interpreted from the beginning leaves no room for the localities to impose either compensatory or retaliatory taxation on government property interests. Their remedy lies in petition to the Federal Congress, which is also their Congress.

The Court further said:

> A state may tax personal property and might well tax it to one in whose possession it was found but it could hardly tax one of its citizens because of moneys of the United States which were in his possession as collector of internal revenue, postmaster, clerk of the United States court, or other Federal officer, agent or contractor. We hold that government-owned property, to the full extent of the government's interest therein, is immune from taxation, either as against the government itself or as against one who holds it as a bailee.

The plaintiff, American Motors Corporation, does not stand to gain or lose either in the event the taxes in question are held valid or if such taxes are held invalid. Under the situation presented here the ultimate gain or loss falls either upon the government or the city of Kenosha. The solution of the questions of law involved and also the large amounts involved make these cases of great importance to both the government and the city. The precise questions presented here for determination have not been passed upon either by the Supreme Court of this state or the Supreme Court of the United States. However, almost the identical question, particularly with respect to the vesting of title to personal property in the government, arose in the case of the *Murray Corporation of America, a Delaware corporation, Plaintiff* v. *City of Detroit, a Mich-*

igan, municipal corporation, and County of Wayne, a Michigan constitutional body corporate, Defendants, and the United States of America, Intervenor, in the U. S. District Court for the Eastern District of Michigan, southern division. This case was decided in favor of the government, the Court holding that under the aforementioned provision of the contract title to the personal property was vested in the government and was not subject to tax by the City of Detroit. The plaintiff and intervenor rely on the decision in this case. Although the reasoning of the District Court judge who rendered the opinion in the case appears to be sound, the judgment in the case is not a final judgment for the reason, as the court is informed, the case is now on appeal to the United States Court of Appeals and what the decision of that Court will be or whether the case will be taken to the United States Supreme Court and what its decision will be remains to be seen.

The court is of the opinion that the plaintiff and intervenor are entitled to recover in each of the three cases, the amount of the recovery with interest in each case to be in accordance with the terms of the stipulation. The court would welcome the benefit of the decision of the Circuit Court of Appeals in the Murray Corporation of America case but the court cannot await that decision for the reason that the amounts involved herein bear interest and it is to the interest of the defendant and it is entitled to a prompt decision herein. The within decision is made in triplicate so that an original may be filed in each of the above three cases. Appropriate orders may be prepared and presented in accordance herewith.

(S) ALFRED L. DRURY,
Reserve Circuit Judge.

Dated March 16, 1956.

2. Opinion of Supreme Court, State of Wisconsin

Appeals from three judgments of the circuit court for Kenosha county: Alfred L. Drury, Circuit Judge. *Reversed.*

Three actions commenced by plaintiff American Motors Corporation against defendant City of Kenosha for the recovery of 1952, 1953 and 1954 personal property taxes paid under protest. The United States of America intervened as a party plaintiff. From judgments on favor of the plaintiffs, defendant appeals.

The facts will be stated in the opinion.

Martin, J. On March 27, 1951 American Motors Corporation (hereafter called the 'Company") entered into a contract with the United States Government, Department of the Air Force (hereaffer called the "Government") for the manufacture and supply of aircraft engines, repair and replacement parts, overhaul tools, test and ground handling equipment and miscellaneous services and the equipment in connection therewith. This contract, known as a "letter contract," was amended on March 18, 1952 and supplanted on August 29, 1952 by a "definitive contract."

The definitive contract contains a clause which provides in substance that upon the making of any partial payment title to all parts, materials, inventories, work in process and nondurable tools theretofore acquired or produced by the Company for the performance of the contract and properly chargeable to the contract under sound accounting practice, should forthwith vest in the Government, and that title to all like property thereafter acquired or produced by the Company for performance of the contract and properly chargeable as aforesaid should vest in the

Government forthwith upon such acquisition or production.

Subs. (d) and (e) of the partial payments clause provide:

> (d) It is recognized that property (including, without limitation completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Clause will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Clause, upon terms approved by the Contracting Officer, provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination clause of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the Contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination

clause of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Clause shall vest in the Contractor.

(e) The provisions of this contract referring to "Liability for Government-furnished Property" and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Clause. The provision of this Clause shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

Pursuant to the contract the Company manufactured aircraft engines, etc., in its plant in the city of Kenosha, acquiring a so-called "aircraft engine inventory," consisting of raw materials, supplies, work in process and completed parts incident to such manufacture. From time to time the Company billed the Government therefor and partial payments were made. The Company, which also manufactured automobiles at its Kenosha plant, kept separate accounts and books with respect to the aircraft engine inventory, physically segregated such inventory and used it for no other purpose.

As of May 1st in the years in question appellant assessed the aircraft engine inventory in the possession of the Company, levied and collected personal property taxes thereon. The lower court held the assess-

ments invalid on the ground that the property in question was owned by the United States Government.

There is no question that property of the Federal Government, in the absence of express congressional consent, is not subject to any form of state taxation.

Sec. 70.18 (1), Stats. provides in part:

> Personal property shall be assessed to the owner thereof, except that when it shall be in the charge or possession of some person other than the owner or person beneficially entitled thereto * * * it shall be assessed to the person so in charge or possession of the same.

The provisions of sec. 70.19 apply to the situation where personal property is assessed "to some person in charge or possession thereof other than the owner or person beneficially entitled thereto," giving such person in charge or possession a right of action "against the owner or person beneficially entitled to such property" for the amount of such taxes.

The question of ownership for tax purposes is one of local law. *Blair* v. *Commisioner* (1937), 300 U. S. 5, 57 Sup. Ct. 330, 81 L. Ed. 465. In *U. S.* v. *Allegheny County* (1944), 322 U. S. 174, 182, 64 Sup. Ct. 908, 88 L. Ed. 1209, the United States supreme court stated that state law would not be decisive of the question of title in the Federal Government, but in many instances title and ownership are two different things, as will be more particularly dealt with hereafter. We will concede that "title" in the property here involved has vested in the Government, as held in *City of Detroit* v. *Murray Corporation of America* (C. C. A. 6, 1956), 234 Fed. (2d) 380, where the partial payments clause of a contract practically identical with this was construed. We may also assume that federal law with respect to the transfer of tangible property in Wisconsin is not different than Wiscon-

sin law, in the absence of proof to the contrary. No such proof has been made in the present case.

In *State ex rel. Wisconsin Univ. Bldg. Corp.* v. *Barcis* (1950), 257 Wis. 497, 505, 44 N. W. (2d) 259, where title to the real estate in question was in the name of the corporation but the beneficial owner was the State of Wisconsin, it was held that "taxation or exemption depends not upon the legal title but on the status of the owner of the beneficial interest in the property."

In *Offcut* [*sic*] *Housing Company* v. *Sarpy* (1956), 351 U. S. 253, 76 Sup. Ct. 814, 100 L. Ed. *658, 663, where the question was presented whether buildings erected by the corporation upon lands leased from the Government were taxable by the State of Nebraska, the United States supreme court stated:

> Labeling the Government as the "owner" does not foreclose us from ascertaining the nature of the real interests created and so does not solve the problem * * * The Government may have "title," but only a paper title * * *

Similarly, in *Corliss* v. *Bowers* (1930), 281 U. S. 376, 377, 50 Sup. Ct. 336, 74 L. Ed. 916:

> * * * taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid.

See, also, *Helvering* v. *Clifford* (1939), 309 U. S. 331, 60 Sup. Ct. 554, 84 L. Ed. 788.

We are therefore concerned only with the question whether the Company or the Government was the true owner of the property involved.

Under the terms of this contract the Company, in its private capacity, acquires materials needed for performance of the contract. In procuring such materials it does not act as purchasing agent for the Government and the Government incurs no respons-

ibility to the vendor for payment of the purchase price. If a partial payment is made, or has previously been made under the contract, title to all such property vests in the Government upon its acquisition by the Company.

Sub. (d) of the partial payment clause specifically provides:

> The Contractor, either before or after receipt of notice of termination at the option of the Government, may *acquire or dispose of* property to which title is vested in the Government under this clause, upon terms approved by the Contracting Officer.

It further provides for payment or credit to the Government account of the amount of the "agreed price" in the case of acquisition by the Company or of the proceeds in the case of "any other disposition." Thus, it appears that the Company's right to acquire or dispose of the property is subject to no restriction, the only requirement being that a price for such acquisition be agreed upon with the Contracting Officer and the amount involved be paid or credited to the Government as the Officer may direct. It is immaterial, as set forth in the stipulation of facts, that the Company has never acquired or disposed of any of the property as permitted under this clause, since it is the right of the Company thereunder rather than its acts that controls.

Current production scrap may be sold by the Company without approval of the Government. With respect thereto the Company is the sole judge of what materials shall be scrapped, how much, to whom it shall be sold and for what price, providing only that the proceeds be applied in accordance with the Officer's direction.

Upon completion of the deliveries called for by the

contract, title to all the property not delivered and accepted by the Government will revert to the Company.

Sub. (e) provides that the Company shall have the complete "risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof."

As stated in 42 Am. Jr., Property:

> Property * * * is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and disposal of the particular subject of property. [Sec. 4, p. 189.]
>
> Both in common parlance and in legal acceptation, he is the owner of property who, in case of its destruction, must sustain the loss of it. [Sec. 37, p. 215.]

See, also, Brown on Personal Property, sec. 5, pp. 6–7.

In our opinion, the unrestricted right of the Company under the contract to acquire and dispose of the property and the risk of loss are elements of ownership inconsistent with the vesting of such title in the Government as would render the property immune from taxation. Conceding that title was transferred, there was, however, no true transfer of ownership.

In holding to the contrary in *City of Detroit* v. *Murray Corporation of America, supra,* where an identical partial-payments clause was construed, we are not satisfied that the United States court of appeals considered the provisions respecting acquisition and disposition and risk of loss, although it would appear from that opinion that arguments based on those provisions were there advanced. The court considered that the decision in *United States* v. *Allegheny County* (1944), 322 U. S. 174, 187, 64 Sup. Ct. 908, 88 L. Ed. 1209, was the controlling authority; it said that all of the arguments made by the City of Detroit were rejected in the *Allegheny* case. But that case presented no such problems as we are here confronted with. The

Government's ownership interest in the property assessed was established by the following facts: One of the machines was manufactured by the contractor, ten of them were furnished by the Government and the remainder were purchased by the contractor from other manufacturers; those bought or built by the contractor were inspected, accepted and paid for by the Government. The case arose when Allegheny County added the value of said machines to the contractor's previously determined assessment for *ad valorem* taxes. The United States supreme court said:

> We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner. *Northern Pacific Ry. Co.* v. *Meyers*, 172 U. S. 589; *New Brunswick* v. *United States*, 276 U. S. 547. But that is not the situation here, and the state has made no effort to segregate Mesta's (the contractor's) interest and tax it. The full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment.

Thus the supreme court distinguished the *Allegheny* case from cases where the Government holds only a "naked title" and the equitable ownership is in one whose interests are taxable. The *Detroit* case, purporting to rely on the *Allegheny* case, does not face the issue of true ownership which is basic to the court's decision in the *Allegheny* case.

Here the Government has performed no act whatever with respect to the property in the Company's possession except to make partial payments under the contract. It has not, as in the *Allegheny* case, inspected, accepted and paid for it. There was, indeed, no certainty at the time the assessments were

made that the property so segregated would be accepted; and the contract provides that title to all such property not eventually delivered and accepted by the Government should vest in the Company. The only regulatory control which the Government has over the property with respect to the Company's right to "acquire and dispose of" it prior to delivery and acceptance, amounts to no more than supervision of the bookkeeping to see to it that the Government is not charged for any of the property so acquired and disposed of. These facts are inconsistent with ownership in the Government.

Counsel for the Company argues that the purpose of the title-vesting provision of the contract was primarily to safeguard the Government against the possibility that its property would be subject to attachment while in the possession of the Company or that its right to immediate possession would be interfered with. Under Title 34 U. S. C. A., sec. 582 and Title 41 U. S. C. A., sec. 154, the partial-payments provision in a Government contract for supplies creates a lien in favor of the Government which is "paramount to all other liens" on such supplies, and the Government's title would be sufficient to insure against any interference with its right to possession. The right to freedom from attachment and the right of possession are rights of a secured creditor rather than incidents of ownership.

In any event, no lien for local property taxes would attach in this case because the contract requires the Company to protest and litigate the levying of such taxes and provides that the Company shall be promptly reimbursed by the Government for such taxes assessed against and paid by the Company. And this indicates to us that it was contemplated that

in some instances the property would be subject to tax.

As stated in 84 C. J. S., Taxation, sec. 198, pp. 381-382:

> * * * the state may tax private property in which the federal government may have an interest, or property the legal title to which is in the United States, but the beneficial ownership in another * * * This immunity (of the government) rests on the sovereign right of the federal government to hold property tax free, and it grows out of the supremacy of the federal government and the necessity that it be able to deal with its own property free from any interference or embarrassment * * * The immunity of federal property from state taxation is to be given a practical application so as to attain its purpose, but without unnecessary interference with the right of taxation. It is personal to the government, and is not transferable to, or to be used for, the special protection of the citizen.

See, also, the cases cited therein.

In our opinion true ownership of the property is in the Company and the assessments are therefore valid.

As to the other questions raised on this appeal, we agree with the decision in *City of Detroit* v. *Murray Corporation of America, supra.*

By the Court.—Judgments reversed and causes remanded with directions to dismiss the complaints.

CURRIE, *J.* (dissenting). I must respectfully dissent from the majority opinion in this case. A grave question of constitutional law is presented in this case because we are confronted by the claim of the United States government, an intervenor in the action, that the city of Kenosha has collected a tax against property of the federal government. Ever since Mr. Chief Justice John Marshall's famous decision in *McCulloch*

v. *Maryland* (1819), 4 Wheaton 316, it has been the law that no state, or political subdivision thereof, can tax the property or instrumentability [sic] of the federal government unless Congress has consented thereto. A clear statement of this doctrine and the underlying reason therefor is stated in *Indian Motorcycle Co.* v. *United States* (1931), 283 U. S. 570, 575, 51 Sup. Ct. 601, 75 L. Ed. 1277, as follows:

> It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system [citing cases]. Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute.

The entire subject of intergovernment tax immunities is reviewed in an article by Prof. B. U. Ratcheford in 6 National Tax Journal 305 (Dec. 1953). The author points out that, while the United States supreme court in recent years has held valid many types of state and local taxation formerly held to contravene the doctrine of governmental immunity, that court has never allowed a state or local tax to be levied upon property owned by the federal government, or by an agency of it, or which bears directly upon a government activity.

If the contract in the instant case had been entered into by American Motors with the "X" corporation

instead of the United States government, I would have no hesitancy in concurring in the opinion as written because of those incidents of ownership in the property in question which inured to the benefit of American Motors in spite of the fact that legal title to such property was vested in the federal government. In such a situation the past interpretation of our property tax statutes would be controlling and no question of federal law would be presented.

The fundamental error, as I view it, is in assuming that the liability for the tax is determinative by Wisconsin and not federal law.

The majority opinion cites *Blair* v. *Commissioner* (1937), 300 U. S. 5, 57 Sup. Ct. 330, 81 L. Ed. 465, as holding that in a situation such as confronts us on this appeal, Wisconsin decisions govern. That case dealt with a question of federal estate taxation. It involved no question of the immunity from a state tax on the part of the federal government, but was concerned with the interpretation of a trust instrument creating a spendthrift trust to which the government was not a party. The point at issue was whether the beneficiary of the trust could assign his interest under the trust, and under a long line of decisions this is a matter of state and not federal law. See 1 Paul, Federal Estate and Gift Taxation, p. 73, sec. 1.11.

The United States supreme court did, however, declare in *Alabama* v. *King & Boozer* (1941), 314 U. S. 1, 9–10, 62 Sup. Ct. 43, 86 L. Ed. 3, 140 A. L. R. 615, that state law was determinative of the issue of who is a "purchaser" under an Alabama sales tax statute in a case which involved the question of immunity of the federal government. This statement was repudiated in the recent case of *Kern-Limerick, Inc.* v. *Scurlock* (1954), 347 U. S. 110, 121, 74 Sup. Ct.

3, 98 L. Ed. 546. In such last mentioned case the urt quoted the portion of the opinion in *Alabama King & Boozer, supra,* indicating that state law verned, and then stated:

> Read literally, one might conclude this Court was saying that a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign. *Such a conclusion as to the meaning of the quoted words would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.* The quotation refers, we think, only to the power of the state court to determine who is responsible under its law for payment to the state of the exaction. [Emphasis supplied.]

A further case, which holds that the issue of whether ere is an immunity from state or local taxation of operty, in which the government claims an interest, esents a question of federal and not state law is *nited States* v. *Allegheny County* (1944), 322 U. S. 4, 182 Sup. Ct., 88 L. Ed. 1209. This was stated in equivocable language as follows:

> Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. *The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State* [citing cases]. [Emphasis supplied.]

Because federal and not state law is decisive of the issue here presented, the recent decision of the United States Court of Appeals for the Sixth Circuit in *City of Detroit* v. *Murray Corporation of America* (1956), 234 Fed. (2d) 380, is absolutely controlling of the result here. The government subcontracts entered into by the Murray Corporation were for the manufacture of parts and assemblies required by the United States Air Force for the national defense, while in the instant case the government contract entered into with American Motors was for the manufacture by the latter of aircraft engines for the same government agency and for the same purpose. The Murray Corporation subcontracts contained the same partial payment vesting of title clause as did the American Motors contract. In substance such clause provided that upon the making of any partial payment, title to all parts, materials, inventories, work in process, and nondurable tools theretofore acquired or produced by the contractor for the performance of the contract and properly chargeable to the contract under sound accounting practices should *forthwith vest in the Government;* and title to all like property thereafter acquired or produced by the contractor for performance of the contract and properly chargeable as aforementioned should vest in the Government forthwith upon such acquisition or production.

The court in *City of Detroit* v. *Murray Corporation of America, supra,* affirmed the judgments of the United States District Court awarding recovery by the corporation of local personal property taxes paid upon materials and parts, title to which had vested in the federal government under the partial payment clause of the subcontracts. On the issue of immunity the court strongly relied upon the case of *United States* v. *Allegheny, supra,* as appears from

the following extract taken from the opinion (234 Fed. (2d) at pages 382–383):

> Upon analysis, we think that substantially all of the arguments advanced by appellant were rejected by the Supreme Court in the Allegheny case. The Supreme Court declared that the principle is unshaken, indeed rarely questioned, that "possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation." 322 U. S. 177, 64 S. Ct. 911.

The majority opinion herein seeks to distinguish the *Allegheny* case from the instant one on the ground that the government in the latter has but bare legal title in the property attempted to be taxed. This totally ignores the self-evident purpose of the partial payment clause, and certain provisions of such clauses. The contract with American Motors was entered into during the Korean conflict when the government desperately needed aircraft engines. The government obviously wished to be sure that any materials and parts procured by American Motors for performance of the contract would not be diverted to any other purpose without its consent. Thus, if American Motors should for any reason default on its contract, the government could step in and use the materials and parts on hand toward completion of the contract. The right of control retained by the government made its ownership far more than a bare legal title.

The majority opinion quotes a statement from the opinion in *Offutt Housing Company* v. *Sarpy* (1956), 351 U. S. 253, 76 Sup. Ct. 814, 100 L. Ed. *658, that the government may have "only a paper title", the inference being that such paper title would not confer immunity from state taxes. An examination of such

case discloses that it clearly is not in point here. There, land owned by the federal government was leased to the plaintiff housing company at a nominal rental for seventy-five years under the Wherry Military Housing Act, the company to erect buildings and improvements thereon to provide adequate housing for personnel of an Air Force base in Nebraska. The county assessor sought to assess the improvements, fixtures and furniture of the plaintiff as subject to state and county personal property taxes. Two issues were presented to the United States supreme court: (1) Whether Congress had consented to the state, or its subdivisions, taxing such property, and (2) if such consent were found to have been given, could the entire value of such improvements, fixtures and furniture be taxed to plaintiff without any diminution of such value because of the government's interest therein. The majority opinion held that Congress had given its consent, and this holding removed from the case the issue of immunity from tax. On the second question of valuation, the court determined that the government had merely bare legal title for purposes of security only, similar to that of a mortgagee, which did not prevent the full value being assessed against the lessee.

The applicable inference to be drawn from the majority opinion in the *Offutt Housing Co.* case, for the purposes of the instant case, is that, if the court had not construed the Wherry Housing Act as granting permission to the state to tax the lessee's interest in the property, there would have been an immunity from state and local taxes.

For the reasons stated herein, and in the able memorandum opinion of the learned trial judge, the judgment should be affirmed.

3. Judgments of the Circuit Court of Kenosha County, Wisconsin

Case No. 13641[1]

The Motion of the plaintiff, American Motors Corporation, a Maryland corporation, and the intervening plaintiff, United States of America, in the above entitled action, to have stricken out the Answer of the defendant, City of Kenosha, a Municipal corporation, and for Summary Judgment for and in favor of the said plaintiff and the said intervening plaintiff and against the said defendant, pursuant to Supreme Court Rule, incorporated into the Wisconsin Statutes of 1953 as Section 270.635, having been duly considered, and the said Motion having been granted by the Court and the entry of judgment directed accordingly, as appears from the decision of the above named Court signed and filed on the 16th day of March, 1956, Reserve Circuit Judge Alfred L. Drury, presiding, and the Order Granting Summary Judgment signed by the said Reserve Circuit Judge Alfred L. Drury on the 27th day of March 1956;

NOW, on motion of LaFrance, Thompson and Zahn and Cook, Beake, Miller, Wrock and Cross, attorneys for the plaintiff, American Motors Corporation, a Maryland corporation, and Edward G. Minor, United States attorney, attorney for the intervening plaintiff, United States of America:

IT IS ADJUDGED, that the plaintiff, American Motors Corporation, a Maryland corporation, and the intervening plaintiff, United States of America, do have and recover of the defendant, City of Kenosha, a

[1] This case, involving taxes for the calendar year 1952, is No 103 in the Supreme Court of Wisconsin.

Municipal corporation, the sum of Three Thousand One Hundred Six and 08/100 ($3,106.08) Dollars together with interest in the sum of Four Hundred Eighty-eight and 76/100 ($488.76) Dollars, making in all the sum of Three Thousand Five Hundred Ninety-four and 84/100 ($3,594.84) Dollars, and the costs of this action, including motion costs, hereby taxed in the sum of One Hundred Twenty-five and 20/100 ($125.20) Dollars.

Dated at Kenosha, Wisconsin, this 30th day of March, 1956.

By the Court:

(S) G. A. STRANGBERG,
Clerk.

Case No. 13642[2]

The Motion of the plaintiff, American Motors Corporation, a Maryland corporation, and the intervening plaintiff, United States of America, in the above entitled action, to have stricken out the Answer of the defendant, City of Kenosha, a Municipal corporation, and for Summary Judgment for and in favor of the said plaintiff and the said intervening plaintiff and against the said defendant, pursuant to Supreme Court Rule, incorporated into the Wisconsin Statutes of 1953 as Section 270.635, having been duly considered, and the said Motion having been granted by the Court and the entry of judgment directed accordingly, as appears from the decision of the above named Court signed and filed on the 16th day of March, 1956, Reserve Circuit Judge Alfred L. Drury, presiding, and

[2] This case, involving taxes for the calendar year 1953, is No. 104 in the Supreme Court of Wisconsin.

the Order Granting Summary Judgment signed by the said Reserve Circuit Judge Alfred L. Drury on the 27th day of March, 1956;

NOW, on motion of LaFrance, Thompson and Zahn and Cook, Beake, Miller, Wrock and Cross, attorneys for the plaintiff, American Motors Corporation, a Maryland corporation, and Edward G. Minor, United States Attorney, attorney for the intervening plaintiff, United States of America:

IT IS ADJUDGED, that the plaintiff, American Motors Corporation, a Maryland corporation, and the intervening plaintiff, United States of America, do have and recover of the defendant, City of Kenosha, a Municipal corporation, the sum of Two Hundred Twelve Thousand Five Hundred Ninety-eight and 90/100 ($212,598.90) Dollars together with interest in the sum of Twenty-two Thousand Two Hundred Thirty-four and 31/100 ($22,234.31) Dollars, making in all the sum of Two Hundred Thirty-four Thousand Eight Hundred Thirty-three and 21/100 ($234,833.21) Dollars, and the costs of this action hereby taxed in the sum of One Hundred Fifteen and 20/100 ($115.20) Dollars.

Dated at Kenosha, Wisconsin, this 30th day of March, 1956.

By the Court:

(S) G. A. STRANGBERG,
Clerk.

Case No. 13741[3]

The Motion of the plaintiff, American Motors Corporation, a Maryland corporation, and the intervening plaintiff, United States of America, in the above

[3] This case, involving taxes for the calendar year 1954, is No. 105 in the Supreme Court of Wisconsin.

entitled action, to have stricken out the Answer of the defendant, City of Kenosha, a Municipal corporation, and for Summary Judgment for and in favor of the said plaintiff and the said intervening plaintiff and against the said defendant, pursuant to Supreme Court Rule, incorporated into the Wisconsin Statutes of 1953 as Section 270.635, having been duly considered, and the said Motion having been granted by the Court and the entry of judgment directed accordingly, as appears from the decision of the above named Court signed and filed on the 16th day of March, 1956, Reserve Circuit Judge Alfred L. Drury, presiding, and the Order Granting Summary Judgment signed by the said Reserve Circuit Judge Alfred L. Drury on the 27th day of March, 1956:

NOW, on motion of LaFrance, Thompson and Zahn and Cook, Beake, Miller, Wrock and Cross, attorneys for the plaintiff, American Motors Corporation, a Maryland corporation, and Edward G. Minor, United States Attorney, attorney for the intervening plaintiff, United States of America:

IT IS ADJUDGED, that the plaintiff, American Motors Corporation, a Maryland corporation, and the intervening plaintiff, United States of America, do have and recover of the defendant, City of Kenosha, a Municipal corporation, the sum of One Hundred Twenty-one Thousand Seven Hundred Forty-two and 27/100 ($121,742.27) Dollars together with interest in the sum of Six Thousand Six Hundred Eleven and 29/100 ($6,611.29) Dollars, making in all the sum of One Hundred Twenty-eight Thousand Three Hundred Fifty-three and 56/100 ($128,353.56) Dollars, and the costs of this action hereby taxed in the sum of One Hundred Fifteen and 20/100 ($115.20) Dollars.

Dated at Kenosha, Wisconsin, this 30th day of March, 1956.

By the Court:

(S) G. A. STRANGBERG,
Clerk.

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4. JUDGMENTS OF THE SUPREME COURT OF WISCONSIN

No. 103

(Filed on January 7, 1957)

This cause came on to be heard on appeal from the judgment of the Circuit Court of Kenosha County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Kenosha County, in this cause, be, and the same is hereby, reversed, with costs against the said respondent taxed at the sum of One Hundred Fifty-three Dollars and Forty-nine Cents ($153.49).

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to dismiss the complaint.

Justice Currie dissents.

No. 104

(Filed on January 7, 1957)

This cause came on to be heard on appeal from the judgment of the Circuit Court of Kenosha County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Kenosha County, in this cause, be, and the same is hereby, reversed, with costs against the said respondent taxed at the sum of

One Hundred Seventy-three Dollars and Thirty-eight Cents ($173.38).

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to dismiss the complaint.

Justice Currie dissents.

No. 105

(Filed on January 7, 1957)

This cause came on to be heard on appeal from the judgment of the Circuit Court of Kenosha County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Kenosha County, in this cause, be, and the same is hereby, reversed, with costs against the said respondent taxed at the sum of One Hundred Seventy-three Dollars and Thirty-eight Cents ($173.38).

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to dismiss the complaint.

Justice Currie dissents.

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5. Order of Supreme Court of Wisconsin Denying Rehearing

(Filed on March 5, 1957)

[Identical orders filed in all three cases on same date]

The Court being now sufficiently advised of and concerning the motion of the said respondent for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied with $25.00 costs.

6. Order Extending Time for Docketing Case in This Court

[Identical orders filed in all three cases on same date]

Upon the foregoing application and all the records and files in this case, and upon motion of Edward G. Minor, United States Attorney for the Eastern District of Wisconsin, and the Court being satisfied that good cause has been shown,

IT IS ORDERED: That a thirty-day extension of time for docketing of the case and filing of the record and the jurisdictional statement thereof with the Clerk of the Supreme Court of the United States, in conformity with Revised Rule 13 of the Supreme Court of the United States, from July 14, 1957, to and including August 14, 1957, be and the same is hereby granted.

Dated: July 10, 1957, Madison, Wisconsin.

(S) Roland J. Steinle,
Justice.

U. S. GOVERNMENT PRINTING OFFICE: 1957